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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958
No. 845

ROBERT F. HARDY and MARY J. HARDY, his wife, MILES CITY BANK, a State Banking Corporation; and ARTHUR T. McINTOSH, Individually and as Trustee,

Petitioners,

vs.

EULA MAY IVINS, as Executrix of the Will of R. L. IVINS, Deceased and EULA MAY IVINS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF RESPONDENTS IN OPPOSITION

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COURT RULE

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JURISDICTION

The petitioners invoke the jurisdiction of this Court in certiorari under 28 U. S. C., §1257, subdivision (3), with specific reference to a statute of the

United States, namely the Taylor Grazing Act (43 U. S. C. §§315 to 315r, inclusive), and to the Fourteenth Amendment to the Constitution of the United States.

Under the jurisdictional provision cited petitioners must show that the state court judgment does at least one of two things: either that it draws in question the *validity* of the Taylor Grazing Act, or that *without due process of law* it deprives them of some title, right, privilege or immunity under that Act which they *specifically set up or claimed* in the state courts by timely action.

QUESTIONS PRESENTED

Two questions are actually presented. The first is jurisdictional. The substantive question is this:

Where the parties stipulate that in the partition of a stock ranch the referees shall give consideration to any values deemed added to fee title lands by adjoining lands held and used under permits under the Taylor Grazing Act, and the referees' report is made in accordance with the stipulation, is a party deprived of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, by the decision of a state's highest appellate court finally affirming the trial court's decree adopting the referee's report?

Neither question fully appears from the petition, which completely overlooks the stipulation, but the substantive question is fully disclosed by the decision against which the petition is directed (Petition, Appendix 2-21).

Under the heading "Question Presented," the petioners propound three questions. In each they ignore their stipulation which the referees' report, the trial court's decree and the state supreme court's decision followed. In the first they indicate that values contributed by adjoining permit land were considered with reference only to petitioners' land and not to that of respondents. In the first and second they assume, contrary to the record, that the decision treats the permit land as "allotted" or "assigned" to the parties, or "in effect partitions" the permit land. In the third they correctly concede that the referees did not *allot*, *assign* or *partition* the permit land, but merely *recommended* and *assumed* that the permit land held in common by both parties would be allotted to the recipient of the adjoining fee title land, in accordance with the Taylor Grazing Act, the regulations and established practice thereunder as shown by the record, and as assumed in their stipulation. Their third question is whether, by such recommendation or assumption, the petitioners, who would receive the beneficial use of the majority of the permit land, would thereby be *illegally* deprived of their one-half interest in the minority of the permit land.

Petitioners' first reference to the Fourteenth Amendment appears in their petition for rehearing. Their first reference to the matters mentioned in their other two questions appears in their petition to this Court. None of their three questions tendered herein was submitted to the state courts; none of them was decided by the state courts.

STATEMENT OF THE CASE

Petitioners' statement of the case is inadequate and somewhat at variance with the facts; but the decision of the Supreme Court of Montana amplifies and corrects their statement in most respects. It is necessary to examine the record to determine when, if ever, a federal question was raised in the state court proceedings.

The district court pleadings consist of amended complaint (R. 1), amended answer (R. 18) and reply to amended answer (R. 25). They are in much the usual form for partition proceedings in the code states and raise or suggest no federal question. They were supplemented and amended by several stipulations, which likewise raise or suggest no federal question.

When the cause came on for trial upon the pleadings the parties presented a stipulation (R. 32ff) agreeing (R. 33):

> "That *the lands and premises* involved in this action and *subject to partition and division shall include* all lands, title to which is now vested in R. L. Ivins and Robert F. Hardy, * * * *lands held under Taylor Grazing permits* and leases issued to the parties "*within the boundaries and immediately adjoining said lands.*"

On September 27, 1954, the court rendered its interlocutory order and decree, reciting the stipulation and in accordance therewith ordering partition of the lands including those held under Taylor Grazing permits.

On November 24, 1954, the parties filed their stipulation, dated November 10, 1954 (R. 44-48), pro-

viding for the appointment of three referees "*to make a partition and division of the lands* owned by the plaintiff, R. L. Ivins, and the defendant, Robert F. Hardy, *together with the* leases and *grazing permits* held and used by both or either of the parties in connection therewith" (R. 44-45). On the same date the court made an order appointing referees to make such partition. It directed them in accordance with the stipulation, including the instruction pursuant to Section 93-6320 of the Revised Codes of Montana of 1947 (R. 47) that they should "locate the share of each cotenant so as to embrace as far as practicable the improvements made" by him and to disregard such improvements in valuing the land.

On January 17, 1955, the parties filed another stipulation (R. 52), providing as follows:

> "That the Interlocutory Decree hereinbefore entered into in the above entitled cause pursuant to Stipulation on the 27th day of September, 1954, may be amended as follows: That whereas said Interlocutory Decree directs the commissioners on partition to partition and divide the parties lands described as the lands held under Taylor Grazing Permits, that said provision be annulled and the following substituted therefor: "The Commissioners are advised that *lands held under Taylor Grazing Permits are not subject to partition and division as such, but the Commissioners are entitled to give such consideration to said lands as being adjoining or adjunct to lands held in fee by either party as they may decide said lands will contribute, if anything, to the value of the lands held in fee which are subject for division*, or that are leased for a term of years."

On the same day the district court made an order

(R. 53-54) amending its interlocutory decree of September 27, 1954, in accordance with the latter stipulation, which it quoted in full.

On March 30, 1955, the referees, acting by majority thereof in accordance with Montana statute (Section 19-101), filed their report (R. 54-61) partitioning the lands owned in fee and stating (R. 55):

> "We wish to make the following recommendations: * * * (2) that the Federally owned land administered by the Bureau of Land Management now under individual allotment to R. L. Ivins and Robert F. Hardy or to Robert F. Hardy and within the boundaries of or immediately adjacent to, be given an individual allotment to the respective owner as by this partition designated."

Their report allotted to petitioner Robert F. Hardy the northern part of the ranch, which he had chosen to occupy and improve (R. 151, 152, 163-164); it included also the original homestead improvements, approximately five-eighths of the leased state land, and approximately six-sevenths of the land held by permits under the Taylor Grazing Act.

On April 4, 1955 the dissenting referee filed what petitioners call a "minority report" (R. 61-71) in which he identified the lands as he would have allotted them, and also the state leased lands and the federal permit lands which "would be adjacent to the lands allotted" to each party (R. 66, 70).

On June 15, 1955, the referees by majority action filed their "supplemental statement to be considered in connection with and to be made a part of the report of referees, Milton C. Simpson and C. M. Allen made and filed herein on March 30, 1955, showing

the basis on which the lands were partitioned and allotted * * *". In it among other things they identified the "Taylor Grazing lands held under permits issued by the Bureau of Land Management and recommended for individual allotment" to the parties (R. 75, 78).

On July 18, 1955, the respondents' motion for adoption of the referees' report came on for hearing in the district court. The three referees agreed that the permit lands added values to the dependent or base lands which they adjoined, but the dissenter advocated an allocation of only 20%, or a discount of 80%, of the carrying capacity of the permit lands, instead of the allocation of 75%, or discount of 25%, decided upon by the other two referees (R. 172-3).

The Manager of the Miles City office of the Bureau of Land Management, in charge of some five million acres of government land in North Dakota, South Dakota and eastern Montana (R. 264) and with twenty years experience with the Bureau there and in Colorado (R. 245), testified that the control of base land controlled the permit land (R. 263-6) so long as the permit fees were paid, that the permits were virtually permanent (R. 248), and that in his twenty years of experience under the Taylor Grazing Act he knew of no permit revoked except for violation of regulation or disposition of base land (R. 254-5).

Petitioners did not testify. Their attorneys did not attempt to repudiate the stipulation, or to object that the agreed attribution of Taylor Grazing land values to the base land would in itself constitute a

deprivation of property without due process under the Fourteenth Amendment; their contention was that a 25% discount of the added values was too little (Petition; Appendix 35). In questioning petitioners' witnesses his attorney repeatedly asked "what would be the maximum percentage in your opinion, that should be allocated to any Taylor Grazing Act areas so used in determining its value to deeded lands, * * *?" (R. 212); "have you formed a conclusion as to the value that you would give to the holding of Taylor Grazing Act lands under permit as applied to your own lands?" (R. 234), and similar questions (R. 233, 238, 273-4, 276-7, 287, 297, 304, 309, 314, 318). His obvious purpose was to establish 20%, instead of 75%, as the value to be attributed, or to increase the discount from 25% to 80%.

The testimony, both by petitioners' and respondents' witnesses, was unanimous that considerable values were added to base land by the permit land.

Upon all the evidence the district court approved the referees' report by interlocutory decree of December 12, 1955 (R. 81), without any mention in recitals, finding, conclusions or decree, of any federal or constitutional question, but with reference (R. 82) to the stipulation authorizing the referees to find what values, if any, were contributed to base lands by permit lands.

In their brief on appeal to the state supreme court, the petitioners raised no federal or constitutional question. Their specifications of error were as follows (Brief 4-6):

"1. The Court erred in finding, holding and deciding that the partition and allotment of lands as provided for by Referees Allen and Simpson was a fair and equitable division thereof.

"2. The court erred in finding, holding and deciding that the report of referees Allen and Simpson should be adopted, approved and confirmed.

"3. The court erred in refusing to find that the report of Referees Allen and Simpson was based upon erroneous principles and should have been rejected.

"4. The court erred in overruling the objections of the defendant Robert F. Hardy to the adoption of the majority report of the Referees Allen and Simpson, which objections included the following:

> "'* * * that said Majority report clearly amounts in its effect to a partition and division contrary to the terms of the Interlocutory Decree in that it treats the fee-owned lands for the Taylor Grazing Act lands (sic.), which is contrary literally and in effect to the law of the case as set forth in the Interlocutory Decree, the powers of the referees being therein specifically confined and limited to the fixation of some contributory value which they might find that the adjacent Taylor Grazing lands used by the parties might add to the fee-owned lands' (Tr. 93).
>
> "'* * * that it has been arrived at contrary to the specific instructions to the referees by the Interlocutory Decree in that it is based upon fictitious or, as designated in the Majority Report, potential values, which is contrary to the law and contrary to the Decree' (Tr. 94).

"5. The court erred in confirming the report of Referees Allen and Simpson which failed to equit-

ably partition the State leased lands, quality and quantity relatively considered.

"6. The court erred in confirming the report of Referees Allen and Simpson which purported to partition Taylor Grazing lands contrary to the order of the court.

"7. The court erred in confirming the report of Referees Allen and Simpson which erroneously charges each of the co-owners with seventy-five per cent of the value of the Federal lands recommended for allotment to such party, on account of the recommended allotment of such Federal lands.

"8. The court erred in confirming the action of the referees in awarding the plaintiff Ivins two sections of land in lieu of his interest in the "L. O. Headquarters."

"9. The court erred in approving a partition which was based in part upon 'potential values' rather than upon actual values."

The only reference in that brief to confiscation of property was as follows:

> "It is respectfully submitted that if the majority report of the referees as approved by the district court were affirmed, it would amount to a confiscation of the property of the Appellant, Hardy without due process of law."

It came in the last two pages of the 45 page brief after the detailed argument of issues, and under the heading "Conclusion." It was not mentioned in the court's decision (Petition, Appendix 2), on the last page of which the court said (Appendix 21):

> "While counsel for respondent has argued that only two of appellant's objections are now prop-

> erly before this court, we have nevertheless carefully examined all specifications of error. Justice requires no less."

Thus no federal question was mentioned or decided by the state supreme court. The dissenting opinion (Appendix 22) made no reference to it.

The first such reference was in the petition for rehearing (Appendix 37), where it was stated as a fourth ground, in addition to the three grounds permitted by court rule.

The rules of the Supreme Court of Montana provide as follows (Rule XV 2):

> "A petition for rehearing may be presented upon the following grounds and none others: That some facts, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed."

In accordance with its practice the court on January 19, 1959, ruled upon the petition for rehearing without a further opinion, by an order merely stating that the petition "is hereby denied." (Appendix 39).

The only further reference in the record to any federal or constitutional question was by District Judge Loucks eight days later, in his so-called "dissenting opinion on order denying petition for rehearing." (R. 24-5).

In it he stated that the "majority opinion", apparently meaning the court's decision which was already in effect, approved the confiscation of petitioners' property and denied their rights under the due process clauses of *the state constitution* and the

Fourteenth Amendment for two reasons: first because he thought it approved acts of the referees which were in violation of the Taylor Grazing Act; and second, because he thought giving "a value equivalent to 75%" of the carrying capacity of permit lands to the allotted dependent or base lands effected a confiscation of Hardy's property without due process of law.

ARGUMENT

No Jurisdictional Ground Is Shown for Writ of Certiorari

This Court is without power to decide whether constitutional rights have been violated, where federal questions were not seasonably raised in accordance with requirements of state law. Edelman v. People, Calif. 1953, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387.

Thus where the question was not raised in trial court the final appellate decision is not subject to review here (Chemical National Bank v. City Bank, Ill., 1896, 160 U. S. 646, 16 S. Ct. 417, 40 L. Ed. 568), especially where under the state practice the appellate court will not revise the judgment of the trial court on questions not therein raised (Louisville, etc. R. Co. v. Woodford, Ky. 1918, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202; Spies v. Illinois, 1887, 123 U. S. 131, 8 S. Ct. 21, 31 L. Ed. 80.)

The expression in 28 U. S. §1257, "where any title, right, privilege or immunity is specially set up or claimed under the Constitution," etc., has a settled meaning; namely, "that the claim must be asserted

at the proper time and in the proper manner by pleadings, motion or other appropriate action under the state system of pleading and practice, * * * and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this Court, when it is clear * * * that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." Atlantic Coast Line R. Co. vs. Mims, S. C. 1917, 242 U. S. 532, 37 S. Ct. 188, 61 L. Ed. 476.

The federal right must be "specially set up or claimed under the Constitution, treaties or statutes of * * * the United States" (28 U. S. C. §1257 (3); Louisville etc. R. Co. v. Smith, Tenn. 1907, 204 U. S. 551, 27 S. Ct. 401, 51 L. Ed. 612. An inferential suggestion is not enough. "A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment." Thomas v. Iowa, 1908, 209 U. S. 258, 28 S. Ct. 487, 52 L. Ed. 782. The claim must be made unmistakeably and not by inference. Winona etc. Land Co. v. Minnesota, 1895, 159 U. S. 540, 16 S. Ct. 88, 40 L. Ed. 252.

A general statement that the decision of a court is against the constitutional rights of the objecting party or against the U. S. Constitution or Amendment 14, or that it is without due process of law, will not raise a federal question. Hamblin v. Western Land Co., Iowa 1893, 147 U. S. 531, 13 S. Ct. 353, 37 L. Ed. 267.

The constitutional clause or statute must be specified in the state court. Lawler v. Walker, Ohio 1852, 14 How. 149, 14 L. Ed. 364; New York Central etc., R. Co. v. New York, 1902, 186 U. S. 269, 22 S. Ct. 916, 46 L. Ed. 1158.

The proper way to raise a federal right is by pleading, motion, exception, or other action set forth in the record, showing that the claim was presented to the court. Loeb v. Columbia Tp., Ohio 1900, 179 U. S. 472, 21 S. Ct. 174, 45 L. Ed. 280.

It is the established law in Montana that questions not raised in the trial court by appropriate pleadings will not be considered on appeal (Milne v. Leiphart, 1946, 119 Mont. 263, 174 Pac. 2d 805), even if specified and argued (Western Montana Marble & Granite Co., v. Rhone, 1923, 69 Mont. 76, 220 Pac. 413), that the issues or theory raised by the pleadings connot be changed on appeal (Eakins v. Frank, 1898, 21 Mont. 192, 53 Pac. 538), that new or inconsistent grounds cannot be asserted on appeal (Flannery v. Campbell, 1904, 30 Mont. 172, 75 Pac. 1109), that the case will not be reviewed on a theory different from that on which it was tried below (Durfee v. Harper, 1899, 22 Mont. 354, 56 Pac. 528; Russell v. Sunburst Refining Co., 1928, 83 Mont. 452, 272 Pac. 998), that the theory on which the case was tried in the court below must be strictly adhered to on appeal, and that a party cannot there assume a position inconsistent with that in trial court (State v. Oakland, 1955, 129 Mont. 347, 287 Pac. 2d 39; Feeley v. Lacey, 1958, Mont. , 322 Pac. 2d 1104); and that a party complaining of error must

stand or fall upon the grounds relied on in the trial court (Bower v. Tebbs, 1957, 132 Mont. 146, 314 Pac. 2d. 731).

As shown by the record, the issues urged by petitioners here were not presented to the trial court by pleadings or otherwise; on the contrary, by the stipulation upon which they submitted the partition to referees and court they expressly authorized the acts which they now contend were contrary to the Taylor Grazing Act and constituted a confiscation of property without due process; by the stipulation they waived the objections which they now seek to assert.

The first and only reference in trial court to the federal Constitution is an excerpt from their brief filed in trial court after the referees' decision (Petition, Appendix 35). It said only that "the Constitution of our country guaranteed" petitioner Hardy's right to sell or mortgage his lands or pass them on to his heirs.

There was no reference to confiscation without due process or to the Fourteenth Amendment. With regard to Hardy and the permit lands the objection was that "the majority referees * * * charged him with the full 100% of their value on their animal unit criteria less 25%," and that in asking the adoption of the report respondents were "attempting to give dignity and legal concord to *the fallacious construction of the law of partition in the State of Montana* as set forth in the Interlocutory Decree."

Thus they were still talking about the question whether under Montana law the partition was a proper one. There was no suggestion that despite

the stipulation no allocation of permit land benefits could be made, but the entirely different one that the 75% allocation was too high, which is purely a question of state law.

But even if it had raised the federal question asserted here, it would have come too late; for the partition had already been submitted to the referees and accomplished by them according to the parties' agreement. Our system of jurisprudence does not permit parties to change their theories after the submission and decision of issues.

Furthermore arguments of counsel in state court form no part of the record. Gibson v. Chouteau, Mo. 1868, 8 Wall. 314, 19 L. Ed. 317; Sayward v. Denny, Wash. 1895, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941; Mutual Life Ins. Co. v. McGrew, Cal. 1903, 188 U. S. 291, 23 S. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33. Certainly they do not frame issues, especially if contrary to those framed by the pleadings and agreements of the parties.

The alleged federal constitutional issue was not raised in the trial court; and it could not have been raised by any possible statement or argument of counsel, in the face of the stipulation, which clearly and finally waived it by agreeing that values added to fee land by permit land could be considered in the partition.

Even if the federal issue had been raised in trial court, it was waived on appeal, for it was not raised in the appellate court by any specification of error. It was not included in the eight specifications of error, as set forth above, concerning which, like the

stipulation of January 17, 1955, the petition is singularly silent.

It is well settled in Montana, by numerous decisions, that questions not raised by specifications of error in appellants' brief are waived, and that the Montana Supreme Court will consider only questions so raised by specifications. Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Rogness v. N. P. Ry. Co., 59 Mont. 373, 196 Pac. 989, Portland Cattle Loan Co. v. Featherly, 74 Mont. 531, 241 Pac. 322.

Thus, in the absence of a specification of error, even if a federal question had been raised in the trial court and argued on the appeal, it would not have been before the supreme court of Montana under the established law and practice.

As noted above, the only reference to a federal question in petitioners' appeal brief is made on page 36 of the Appendix; the reference cited appeared in the last two pages of a 45 page brief, under the heading "Conclusion."

If appellants' intention was to raise a federal question by this passing reference and without specification of error, the question was not recognized by the court; for as noted above, the court discussed no federal question, but at the end of its decision (appendix 21) emphasized that it had disposed of all specifications of error and added: "Justice requires no less."

The dissenting opinion does not mention any federal question as being before the court, nor complain that the decision ignored it. The only objections raised by the dissenters were these (Appendix 22):

"We think the inequality * * * is so pronounced

that the trial court ought not to have approved it."

* * *

"If it were proper to consider the value of the Taylor grazing land, * * * we cannot believe that they are worth 75 per cent of the value of deeded land * * *."

* * *

"* * * when the discrepancy in acreage given to each is as great as that here, it lacks the equality of treatment which the law and equity favors."

"We think that a more equitable acreage division should be made * * *."

* * *

"We see nothing in the stipulation that binds defendant to *the award here made* * * *."

It is apparent that they were still discussing the nonfederal question whether the partition was equitable. They were correct in stating that the stipulation authorizing the referees to give consideration to permit land did not bind defendants from objecting that they had given it such consideration that the particular "award here made" was inequitable. But they certainly cannot have meant that the agreement did not bind them from raising the federal question that no consideration whatever could be given to permit land, and that any such consideration ipso facto constituted confiscation without due process under the Fourteenth Amendment.

Obviously therefore, since neither the court nor the dissenters discussed any federal question, neither considered that any such question was presented.

The first, clear or specific mention of a federal

question was made in the petition for rehearing, and it was made in violation of court rule.

As noted above, the rule provides only three grounds for rehearing, none of which provides for then raising a new issue, federal or non-federal. Yet the petition stated the three grounds and added a fourth (Appendix 37) that the affirmance of the decree constitutes a confiscation of petitioners' property in violation of both Sections 3 and 97 of the Constitution of Montana and the Fourteenth Amendment to the Constitution of the United States.

In accordance with its practice, the court disposed of the petition for rehearing by an order merely stating that it "is hereby denied." There being no new decision there was nothing from which to dissent, but the district judge sitting in lieu of one of the justices filed what he called "my dissent from the order denying appellants' petition for a rehearing." (Appendix 24).

In it he does not state any reason why the motion should be granted, but refers to the new question first mentioned in the petition for rehearing.

He does not suggest that in denying the petition the court actually decided a federal question but refrained from mentioning it. In any event, where a decision does not show that a federal question was presented and decided, a statement by a judge that such question was decided is not sufficient to show federal jurisdiction. Charleston Federal Sav. & Loan Assn. v. Alderson, W. Va. 1945, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857.

Admittedly, if the highest state court had actually

ruled upon a federal question, certiorari should be entertained, even if the federal question was not raised in the trial court, and was raised for the first time on petition for rehearing (Hill v. Smith, Mass. 1923, 260 U. S. 592, 43 S. Ct. 219, 67 L. Ed. 419), but not unless it is affirmatively shown that the court actually entertained and decided it (Susquehanna Boom Co. v. West Branch Boom Co., Pa. 1884, 110 U. S. 57, 3 S. Ct. 438, 28 L. Ed. 69; Montana v. Rice, 1907, 204 U. S. 291, 27 S. Ct. 281, 51 L. Ed. 490; Radio Station WOW v. Johnson, Neb. 1945, 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092; and numerous other decisions cited under 28 U. S. C. A. § 1257, n. 222). But a federal question cannot be assumed to have been raised and passed on in a state court so as to give jurisdiction to this Court when nothing appears on the record to show on what grounds the decision was made on the matter in which the federal question was allegedly involved. Caperton v. Bowyer, W. Va. 1871, 14 Wall. 216, 20 L. Ed. 882.

To confer jurisdiction upon this Court the record must affirmatively show, either that the question was raised as an issue in the trial court, or that it was nevertheless actually decided by the highest appellate court (Bailey v. Anderson, Va. 1945, 326 U. S. 203, 66 S. Ct. 66, 90 L. Ed. 3), and that its decision was necessary to the determination of the cause (Lynch v. People, N. Y. 1934, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191; Whitney v. People, Cal. 1927, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095.)

This court will not review a state court decision resting on adequate non-federal grounds (Young v.

Ragen, Ill. 1949, 337 U. S. 235, 69 S. Ct., 1073, 93 L. Ed. 1333), and has no jurisdiction to do so (Dixon v. Duffy, 1952, 344 U. S. 143, 73 S. Ct. 193, 97 L. Ed. 153); if it appears that the state court's decision might have rested upon a non-federal ground, this Court will not take jurisdiction to review it (Durley v. Mayo, Fla. 1956, 351 U. S. 277, 76 S. Ct. 806, 100 L. Ed. 1178); if the decision can be considered ambiguous, this Court will choose an interpretation which would not confront it with a constitutional question (Black v. Cutter Laboratories, Cal. 1956, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188).

We respectfully submit that the federal question here asserted was not presented to the trial court by any authorized manner or otherwise, nor decided by it; that it was not presented to the state supreme court in accordance with state court practice, or at any time before petition for rehearing; that it was not decided by that court, either by its decision or by its denial of the petition for rehearing; that it was not necessary to the determination of the cause; and that the decision was based entirely on adequate non-federal grounds.

ON THE ISSUES

1. THE VALIDITY OF A STATUTE IS NOT DRAWN IN QUESTION.

Petitioners state in their petition (14) that the decision approving the referees' report could not have been reached without taking into account the rights of the parties under the Taylor Grazing Act, and

that "accordingly, this Court may properly review the judgment of the state court."

28 U. S. C. § 1257 does not say *take into account rights* under a statute, but *draw in question the validity* of a statute. The two things are quite different.

The decision of the state supreme court did not draw in question the validity of the Taylor Grazing Act. A statute is not drawn in question every time rights under it are controverted or affected. (Kennard v. Nebraska, 1902, 186 U. S. 304, 22 S. Ct. 879, 46 L. Ed. 1175); Blackburn v. Portland Gold Min Co., Colo. 1900, 175 U. S. 571, 20 S. Ct. 222, 44 L. Ed. 276); the validity of a statute is drawn in question whenever the power to enact it is fairly open to denial, and is denied (Baltimore, etc., R. Co. v. Hopkins, 1889, 130 U. S. 210, 9 S. Ct. 503, 32 L. Ed. 908; Miller v. Cornwall R. Co., Pa. 1897, 168 U. S. 131, 18 S. Ct. 34, 42 L. Ed. 409).

2. DUE PROCESS OF LAW NOT IN ISSUE.

By "due process of law" is meant that which follows the general rule established in our system of jurisprudence for the security of private rights, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained, and, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Hagar v. Reclamation District, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569;

Marchant v. Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. Ed. 751.

Where parties to an action were fully heard in the state supreme court in the regular course of judicial proceedings, the court's reversal of a former decision to the prejudice of a party did not constitute the taking of his property without due process of law, in violation of the Fourteenth Amendment. Tidal Oil Co. v. Flanagan, Okl. 1924, 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 382.

Certainly the same is true of any decision in an action not otherwise involving a federal question, which is unsatisfactory to a party because it does not give him all he desires. If that were not true, all state court decisions could be brought before this Court.

A decision of a state court upon a question of law cannot be reviewed in this Court as presenting a question of the violation of the Fourteenth Amendment merely because such decision is asserted to be wrong. Patterson v. Colorado, 1907, 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689.

Thus the decision of the state court concerning the application of a state statute is not open to review here, even though this Court might consider the particular application to be rather hard. Hartford Life Ins. Co. v. Blincoe, 1921, 255 U. S. 129, 41 S. Ct. 276, 65 L. Ed. 549.

It is clear from the record that petitioners had "due process," in spite of the fact that the referees, the trial court and the state supreme court did not give them precisely the desired result. A dissatis-

fied party may feel that he is deprived of property by an adverse judgment; but if he has been accorded his fair day in court he had not been deprived of it without due process.

Apparently realizing that fact, appellants here shift ground and assert (Petition 11-14) that the referees' consideration of values contributed to dependent or base land by permit land ipso facto deprived them of property because it reduced their allotment of fee lands and also deprived them of rights under the Taylor Grazing Act.

If so, it was not without due process, for petitioners were not only given the right to be heard in that regard, but affirmatively stipulated that it should be done. No other meaning can be assigned to the agreement that the referees were to "give such consideration" to the Taylor Grazing lands "as they may decide said land will contribute, if anything, to the value of the lands held in fee." They could give consideration to it only by correspondingly increasing the allocated values of the dependent base lands owned in fee. Obviously the one to whose allotment the most permit land values attached would to that extent receive a smaller fee land allotment. When the stipulation was made the petitioners knew that they would receive it by virtue of §93-6320 of the Montana Codes and their election to occupy and improve the north part of the ranch. If their desired 20% allocation of permit values had prevailed the arrangement would have paid off 5 to 1 in carrying values; the fact that it paid off only 4 to 3 is a matter of degree only, which raises only a state ques-

tion under the Montana partition statutes. Presumably that is why petitioners fail to mention the stipulation in their petition.

It is a non-federal question whether there was in effect a taking of petitioners' property by an unequal division. On the other hand if, as they now contend, there was a taking of their property merely because of the referees' consideration of the values added to dependent or base land by permit land and a consequent adjustment in the division of fee lands, it was not without due process; for it was with their agreement and consent.

CONCLUSION

We respectfully submit that there is here no jurisdiction in certiorari, because no federal question was presented to, or decided by, the state courts in the manner required by 28 U. S. C. § 1257, subd. (3) and the decisions of this Court, or in accordance with the rules, decisions and practice of the state supreme court.

We submit further that no substantive ground here exists for a writ of certiorari for the following reasons:

(1) That the state supreme court's decision does not draw in question a statute of the United States;

(2) That no title, right, privilege or immunity has been specially set up in the state court proceedings or denied by the judgment;

(3) That the petitioners expressly stipulated and agreed in trial court that the referees in partition should do what they now attack as depriving them

of property without due process, and thereby expressly waived the question now sought to be raised; and

(4) That insofar as petitioners' attack is upon the result reached by the referees rather than upon their compliance with the stipulation, a non-federal question is raised which is not properly before this Court.

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

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